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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 739

UNITED MOTOR SERVICE, INCORPORATED,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

BENJAMIN E. JAFFE,
Counsel for Petitioner.



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THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

The petitioner, by its attorney, prays that a writ of certiorari issue, to review the judgment of the Court of Claims of the United States entered in this case on November 12, 1940, sustaining respondent's demurrer and dismissing petitioner's petition.

Opinion Below.

The opinion of the Court of Claims (R. 29-35) is reported in 35 F. Supp. 466.

Jurisdiction.

The judgment of the Court of Claims of the United States was entered on November 12, 1940 (R. 35). The jur-

isdiction of this Court is invoked under the Act of February 13, 1925 (c. 229 #3, 43 Stat. 936), as amended by the Act of May 22, 1939 (c. 140, 53 Stat. 752).

Questions Presented.

1. Whether Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934 imposing a capital stock tax for the years ended June 30, 1933 and June 30, 1934, respectively, are so unreasonable, arbitrary, capricious and discriminatory as to violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

2. Whether said Sections of said Act, impose a direct tax in violation of Art I, Sec. 2, Subd. 3, and Art. I. Sec. 9, Subd. 4, of the Constitution of the United States.

Statutes Involved.

This will be found in the Appendix, *infra*, pp. 14-16.

Statement.

The facts as set out in the amended petition, and as admitted by respondent's demurrer (R. 29) are substantially as follows:

This is a suit against the United States for the recovery of capital stock taxes paid by the petitioner for the years ended June 30, 1933, and June 30, 1934 (R. 1-2) and is based upon the ground that Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934, are unconstitutional (R. 17-21).

Petitioner is a Delaware corporation, with its offices and place of business in Detroit, Michigan, engaged in the business of selling automotive parts and accessories, and servicing of automotive vehicles. Plaintiff's entire capital

stock, consisting of 5,000 shares of the par value of $10 per share, has at all times been owned by General Motors Corporation, a Delaware corporation, (hereinafter referred to as General Motors).

During the years 1929 and 1937, there were sharp fluctuations in petitioner's net taxable income, varying from $1,021,272.87 in 1929 down to $259,494.63 in 1932, and up to $1,465,370.92 in 1936. The per cent ratio of net taxable income to net sales varied from 2.08 in 1931 to 5.81 in 1936 (R. 3).

Petitioner paid no dividends in 1933 and 1934 and paid dividends of $1,750,000.00 in 1935, $1,137,500.00 in 1936, and $850,000.00 in 1937 (R. 4). Petitioner's net worth as per its books of account during 1929 to 1937 showed fluctuations from a low of $277,067.88 in 1931 to $727,257.89 in 1933, to $1,308,824.03 in 1934, to $88,238.37 in 1935 (R. 4).

General Motors filed a consolidated income tax return for itself and its subsidiaries (including petitioner), for the year 1933. In determining the values to be declared for capital stock tax purposes for the year ended June 30, 1933, for General Motors and its subsidiaries, it was decided that the total of such declarations of value shall be substantially equal to the capital and surplus of General Motors as of December 31, 1932, or $852,130,000.00, and this total amount was then allocated to General Motors and is subsidiary corporations, on the basis of the relative estimated earnings of General Motors and its subsidiaries for the year 1933. The amount thus allocated to petitioner was $3,120,000.00, which petitioner declared as the value of its capital stock in the capital stock tax return which it filed for the year ended June 30, 1933 (R. 5-6).

For the year ended June 30, 1934, the total declared values for General Motors and its subsidiaries was determined in such amount as on a 12½% return would require net earnings of General Motors and its subsidiaries,

of $2.50 per share on the outstanding common stock of General Motors. The total amount of declared values thus arrived at was $1,004,153,000.00, and this total was allocated to General Motors and its subsidiaries on the basis of the relative estimated earnings of General Motors and its subsidiaries for 1934. There was thus allocated to petitioner the sum of $6,000,000.00, which petitioner declared as the value of its capital stock in the capital stock tax return which it filed for the year ended June 30, 1934 (R. 7).

If petitioner had not been permitted by subsequent Congressional enactments to change the value of its capital stock as declared for the year ended June 30, 1933, it would have been required to pay excess-profits taxes of $11,183.62 for 1934; $4,109.13 for 1935; $129,179.51 for 1936, and $106,-032.22 for 1937 (R. 8-9).

If petitioner had not been permitted by subsequent Congressional enactments to change the value of its capital stock as declared for the year ended June 30, 1934, it would have been required to pay excess-profits taxes of $92,849.51 for 1936, and $68,687.022 for 1937 (R. 9). Based on the declarations of capital stock values for 1934, General Motors was required to pay excess-profits taxes of $2,464,706.06 for 1935, and in addition, its subsidiaries paid excess-profits Taxes of $158,434.53 for 1935. (See Schedule, R. 10-11.)

The consolidated figures for the years 1929 and 1937, show a variation in net sales from a high of $1,504,400,000.00 in 1929, to a low of $432,300,000.00 in 1932, and a variation in net income from a high of $248,280,000.00 in 1929, to a low of $160,000.00 in 1932 (R. 12).

The consolidated earnings per share of General Motors stock outstanding show a variation of earnings of $5.63 for 1929, to a loss of 21 cents per share in 1933, to earnings per share of $5.35 in 1936 (R. 13). The price range of General Motors common stock was a high 91¾ in 1929 and a low of 7⅝ in 1932, and a high of 77 in 1936 (R. 29). Exhibits

"C" and "K" set out certain general economic data for the country for 1929 to 1938 (R. 22-29).

Specification of Errors to be Urged.

The Court of Claims of the United States erred:

1. In failing to hold that Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934, imposing a capital stock tax for the years ended June 30, 1933 and June 30, 1934, respectively, are so unreasonable, arbitrary, capricious and discriminatory as to violate the due process clause of the Fifth Amendment.

2. In failing to hold that said Sections of said Acts impose a direct tax in violation of Art. I, Sec. 2, Subd. 3, and Art I, Sec. 9, Subd. 4, of the Constitution of the United States.

3. In sustaining the respondent's demurrer and dismissing petitioner's petition.

Reasons for Granting the Writ.

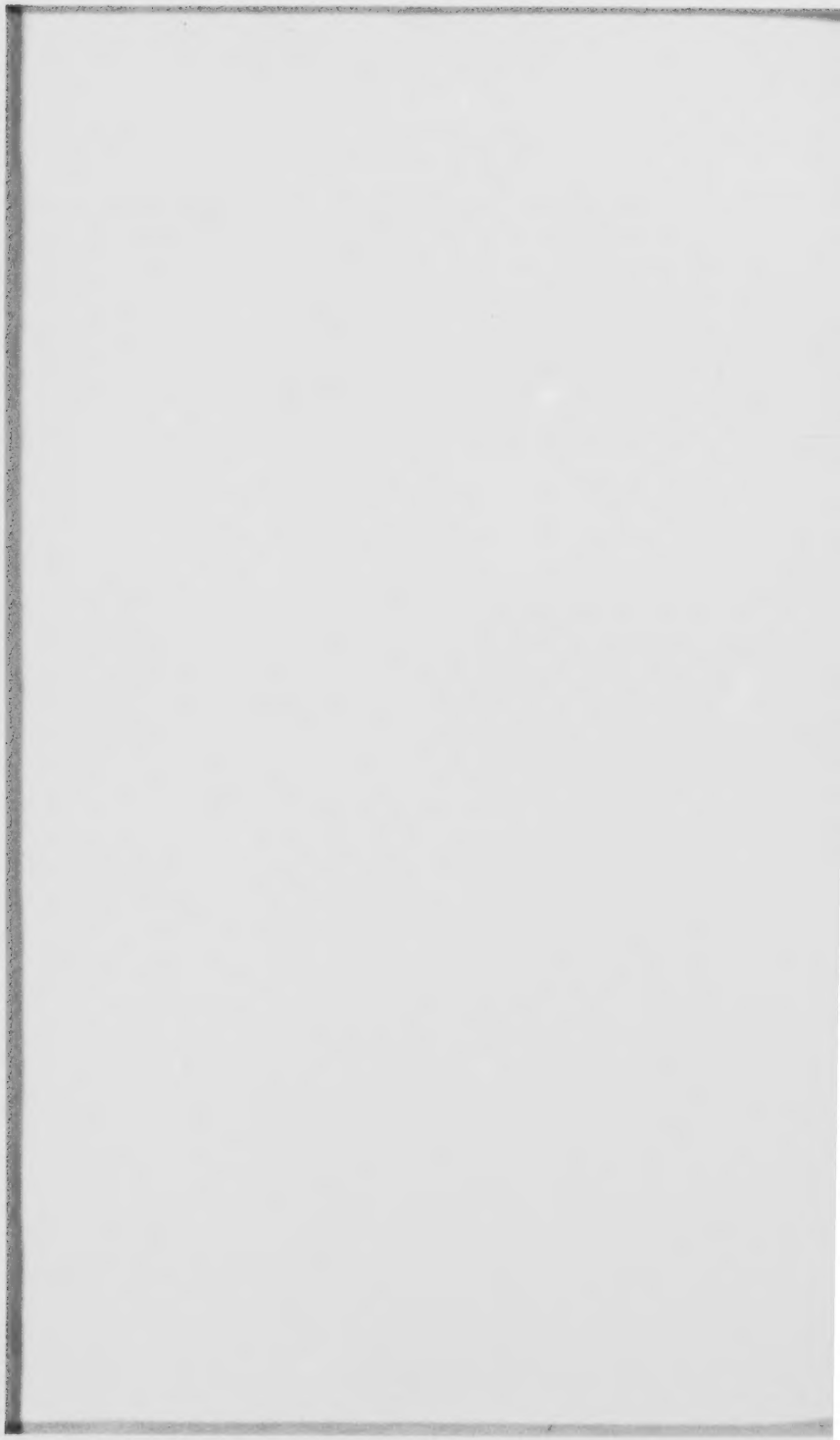
1. The Court of Claims of the United States in this case has decided an important constitutional question, which has not been, but should be, settled by this Court.

2. The decisions of the lower courts are in conflict on the question as to whether the value of the capital stock required to be declared by the Acts in question, must have some reasonable relationship to actual or fair value, or whether the declared value is binding on the taxpayer regardless of actual or fair value.

A. In *Oertel* v. *Glenn*, 13 F. Supp. 651, the District Court (W. D. Ky.), in passing upon the capital stock tax provisions of the N.I.R.A., said—"If the Act here in question is construed to raise a conclusive presumption that the tax is to be levied on the declared value of the taxpayer regardless

of the actual value, it is violative of the Fifth Amendment." In *Allied Agents* v. *The United States,* 26 F. Supp. 98, the Court of Claims held that "the actual value is immaterial." In *Kentucky Fire Brick Co.* v. *Glenn,* 34 F. Supp. 35, (W. D. Ky.), the Court expressly rejected the interpretation of the Court of Claims and held "that the purpose of the Act is to impose a tax based on the fair and reasonable value of the stock, rather than upon an arbitrary value fixed by the taxpayer." In the instant case, the Court of Claims held that "while the statute did not require the use of the actual or fair value of the stock, the intent of the statute was that a fair valuation should be stated." In *Oertel* v. *Glenn,* 97 F. (2d) 495, the Sixth Circuit Court of Appeals held that "it is the intent of the statute that constitutes the law."

3. The Court of Claims has decided an important constitutional question in a way probably in conflict with applicable decisions of this Court.



BRIEF IN SUPPORT OF PETITION.

Reference to the opinion below, jurisdiction, a statement of the questions presented, facts in this case, specifications of errors to be urged, and reasons for granting the writ, will be found in the foregoing petition. The statutes involved are set out in the Appendix, *infra*, pp. 14-16.

ARGUMENT.

The opinion of the Court of Claims disposes of this case and the case of *General Motors Corporation, (as transferee in complete liquidation of Walter J. Bemb, Inc.)* v. *The United States.* A separate record and petition in that case are being simultaneously filed herewith. The petition adopts, by reference, the argument as herein stated.

These two cases involve the constitutionality of Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934. The former was adopted on June 16, 1933, the latter on May 10, 1934. Both Sections impose an excise tax upon a corporate taxpayer with respect to doing business for any part of the year ending June 30, 1933 and 1934, respectively, of $1 for each $1,000 of the adjusted declared value of its capital stock. Said Section 215 exempted any corporation which did not do business during a part of the period from the date of the enactment of the N.I.R.A. (June 16, 1933) to June 30, 1933, and said Section 701 exempted any corporation which did not do business during part of the period from the date of the enactment of the Revenue Act of 1934 (May 10, 1934) to June 30, 1934. These Sections require the filing of returns for the first year, making a declaration of the value of a corporation's capital stock—and provided that such declared value could not be amended. For all subsequent years the adjusted declared value was to be

the original declared value, after making certain specified capital adjustments.

Sections 216 and 702 of said Acts, respectively, imposed for each income taxable year ending after the close of the first capital stock tax year, an excess-profits tax equivalent to five per centum of such portion of the corporation's income as was in excess of 12½ per centum of the adjusted declared value, determined as aforesaid.

Section 703 of the Revenue Act of 1934 provided that Section 215 of the N.I.R.A. shall not apply to any taxpayer in respect of any year, except the year ending June 30, 1933, and that Section 216 of the N.I.R.A. shall not apply to any taxpayer in respect of any taxable year ending after June 30, 1934.

"This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment." *Nichols* v. *Coolidge,* 274 U. S. 531.

The Court of Claims in this case held—"That no one was better qualified to place an estimate upon the value of the stock than the taxpayer itself * * *." In *Allied Agents* v. *United States,* 26 F. Supp. 98, the Court of Claims held that "the actual value is immaterial."

Assuming, that a taxpayer has no desire to avoid its just tax obligations and wishes to declare a fair value for it capital stock, we submit that there is no reasonable or fairly certain basis or standard for determining a value of capital stock for all time, as required by these Acts. A value for capital stock as determined in 1933 may be fair and reasonable at that time, but may be wholly arbitrary, unreasonable and unfair in 1934 and subsequent years. A value declared under Sections 215 of the N.I.R.A. and 701 of the Revenue Act of 1934, was binding upon the taxpayer for all time. The capital adjust-

ments required by said Acts have no reasonable relationship to value, and may readily run counter to changes in value. The privilege given by subsequent Congressional enactments to change the declaration of value made conclusively binding for all time in the prior Acts, does not render such prior Acts reasonable and constitutional. On the contrary, it is to some extent a recognition by Congress of the unreasonable nature of the requirements of such prior Acts. "The taxpayer may justly demand to know when and how he becomes liable for taxes. He cannot forsee, and ought not to be required to guess the outcome of pending measures." *Untermyer* v. *Anderson*, 276 U. S. 440.

The issue, therefore, is not whether the taxpayer is best qualified to make an estimate of the value of its capital stock for all time, but whether such a requirement is so unreasonable and arbitrary as to offend the Due Process Clause of the Fifth Amendment.

It is obvious that any declaration of value for all time cannot be based upon any of the underlying factors which the Courts have held must be taken into consideration in determining the value of capital stock. "But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside that which results from such use." *Cleveland, Cincinnati, Chicago and St. Louis Ry. Co.* v. *Backus*, 154 U. S. 439.

The Court of Claims in its opinion in this case said that—"The value of stock in a going and operating concern, is always based largely on an estimate of the amount of profit which it will make in future years." It cannot be denied, however, that such an estimate will vary materially from time to time, depending upon the economic conditions at the time of the estimate and of the several

preceding years. Obviously such an estimate, if made in 1929 (prior to the market crash) would be greatly different than such an estimate if made in 1932 and the estimate made in 1932 would be greatly different than that made in 1936.

Mr. Justice Holmes has said that "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner,* 256 U. S. 345. The statistical tables submitted in this case (R. 22-29) prove, if any proof is needed, the tremendous fluctuations in the underlying economic factors determining value of capital stock. In 1929, General Motors common stock sold at a high of 91¾ and a low of 33½; in 1932 the high was 22⅝ and the low 7⅝, and in 1936 the hgih was 77 and the low 53⅞ (R. 29).

The financial history of this petitioner (R. 3-4) and of General Motors, its parent company (R. 12-13) shows similar tremendous fluctuations. We submit, therefore, that any declaration of value for all time cannot possibly have any reasonable relationship to any known or accepted standard for determining value, and that a tax imposed on such declaration of value is not only so unreasonable and arbitrary, as to be violative of the Fifth Amendment, but is also a direct tax imposed in violation of Art. I, Sec. 2, Subd. 3, and Art. I, Sec. 9, Subd. 4 of the Constitution. *Levy* v. *Wardell,* 258 U. S. 542. "Taxes are very real things and statutes imposing them are estimated by practical results." *Nichols* v. *Coolidge, supra.* Also, *Farmers Loan and Trust Co.* v. *State of Minnesota,* 280 U. S. 204.

The Courts have uniformly held that there is no duty upon a taxpayer to so arrange its affairs as to pay the maximum tax. On the contrary, it is reasonable to assume that a taxpayer will within the law, seek to minimize its taxes.

Assuming, therefore, that the Acts in question, permit the taxpayer to declare any value for its capital stock regardless of actual or fair value, the capital stock tax provisions in question are unconstitutional, because when considered together with the excess-profits tax provisions of the said Acts in question, it is obvious that they compel the taxpayer to guess the future trend of its earnings for all time. The financial history of the petitioner and of the country during the nine year period from 1929 to 1937, as disclosed by the record in this case (R. 3-4; 12-13; 22-29), shows the utter impossibility of determining, with any reasonable degree of accuracy, the trend of future earnings.

The tremendous penalties which were imposed for a wrong guess as to future earnings is forcefully illustrated by this record. Based on the 1934 declarations, General Motors paid excess-profits taxes of $2,464,706.76, and its subsidiaries a total of $158,343.53 for 1935 (Schedule R. 10-11). The total amount of excess-profits taxes collected by the Government for the year ending June 30, 1935, was $6,560,000.00 (Report of the House Sub-Committee on Internal Revenue Taxation, Jan. 14, 1938, p. 57-58).

The necessity for raising revenue, preventing tax avoidance or the difficulty of administration, do not justify deprivation of constitutional rights. *Schlessinger* v. *Wisconsin*, 270 U. S. 230; *Heiner* v. *Donnan*, 285 U. S. 312. The case of *LaBelle Iron Works* v. *U. S.*, 256 U. S. 377, cited by the Court of Claims, is not applicable because there the tax was levied by reference to a readily determinable basis—invested capital. The complaint was only that in its operation it bore more heavily on some as compared with others. Here the liability is made to depend on a value required to be declared for all time, or on a guess as to future earnings. The admitted facts in this case show the unreasonable and arbitrary nature of either basis.

Retroactive Features of the Tax.

Under Section 215 of the N. I. R. A., a corporation which was engaged in business during the entire period from July 1, 1932, to June 15, 1933, and ceased doing business on the latter date, was not liable for any tax for the year ending June 30, 1933, whereas, a corporation which was organized and started doing business on June 30, 1933, was subject to the tax for the entire year. In *General Motors Corporation, Etc.,* v. *The United States,* where a petition for a Writ of Certiorari to the Court of Claims is being filed simultaneously herewith, the corporation was organized on May 5, 1933, started doing business on May 20, 1933, and was subjected to the capital stock tax for the entire tax year.

Under Section 701 of the Revenue Act of 1934, a corporation which did business during the entire period from July 1, 1933, to May 9, 1934, and ceased doing business on May 9, 1934, was not liable for any tax for the year ending June 30, 1934, whereas, a corporation which was organized and started doing business on June 30, 1934, was subject to the tax for the entire tax year. A period of sixteen days in one instance, and fifty days in the other, is by Congress declared to be a taxable year. We submit that the unreasonableness, arbitrary and discriminatory nature of the retroactive provisions of the Acts here in question, and the long period of retroactivity, render them unconstitutional. It is to be noted that the previous capital stock tax repealed in 1926 was applied prospectively and granted no discriminatory and unreasonable exemptions.

In *Hudson* v. *U. S.,* 12 F. Supp. 620; 13 F. Supp. 640, the Court of Claims in considering the question of the constitutionality of the "Silver Purchase Act" as an excise tax, said:

> "We think, putting these decisions together, it may be said that they hold in effect that if at the time a

citizen enters into a transaction it is not taxable and he has no reason to believe or expect a tax will in the future be imposed by reason of it, a valid tax thereon cannot be laid by subsequent Statute."

While this Court on appeal upheld the constitutionality of this Act, it did not deny the validity of the principle as thus stated by the Court of Claims. It sustained the Act on the ground that it imposed "a special income tax", and that the period of retroactivity (35 days) was not unreasonable.

U. S. v. *Hudson,* 299 U. S. 498. See also *Nichols* v. *Coolidge,* 274 U. S. 531;
Blodgett v. *Holden,* 275 U. S. 142; 276 U. S. 594;
Untermyer v. *Anderson,* 276 U. S. 440; *Lewellyn* v. *Frick,* 268 U. S. 238;
Schwab v. *Doyle,* 258 U. S. 529.

The retroactive application of the capital stock tax also destroys the character of the tax as one on privileges and so renders it invalid as an unapportioned direct tax forbidden by Sections 2 and 9 of Article I of the Constitution. *Milliken* v. *U. S.,* 283 U. S. 15; *Levy* v. *Wardell,* 258 U. S. 542.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari to review the judgment of the Court of Claims of the United States should be granted.

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APPENDIX.

Capital Stock and Excess-Profits Tax.

(Imposed by National Industrial Recovery Act of June 16, 1933.)

Sec. 215. (a) For each year ending June 30 there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 per each $1,000 of the adjusted declared value of its capital stock.

Sec. 215. (b) For each year ending June 30 there is hereby imposed upon every foreign corporation with respect to carrying on or doing business in the United States for any part of such year an excise tax equivalent to $1 for each $1,000 of the adjusted declared value of capital employed in the transaction of its business in the United States.

Sec. 215. (c) The taxes imposed by this section shall not apply——

Sec. 215. (c) (1) To any corporation enumerated in section 103 of the Revenue Act of 1932;

Sec. 215. (c) (2) To any insurance company subject to the tax imposed by section 201 or 204 of such Act;

Sec. 215. (c) (3) To any domestic corporation in respect of the year ending June 30, 1933, if it did not carry on or do business during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive; or

Sec. 215. (c) (4) To any foreign corporation in respect of the year ending June 30, 1933, if it did not carry on or do business in the United States during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive.

Sec. 215. (d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is

located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, in so far as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extensions shall be for more than sixty days.

Sec. 215. (e) Returns required to be filed for the purpose of the tax imposed by this section shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns made under Title II of the Revenue Act of 1926.

Sec. 215. (f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions

to capital, and (3) earnings and profits, and minus (a) the value of property distributed in liquidation to shareholders, (b) distributions of earnings and profits, and (c) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted, in accordance with the regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases (for the period specified in the preceding sentence) in the capital employed in the transaction of its business in the United States.

Sec. 215. (g) The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

Sec. 216. (a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or in the case of a foreign corporation the adjusted declared value of capital employed in the transaction of its business in the United States) as of the close of the preceding income-tax taxable year) (or as of the date of organization if it had no preceding income-tax taxable year) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

Sections 701 and 702 of the Revenue Act of 1934 are substantially similar to the above sections.



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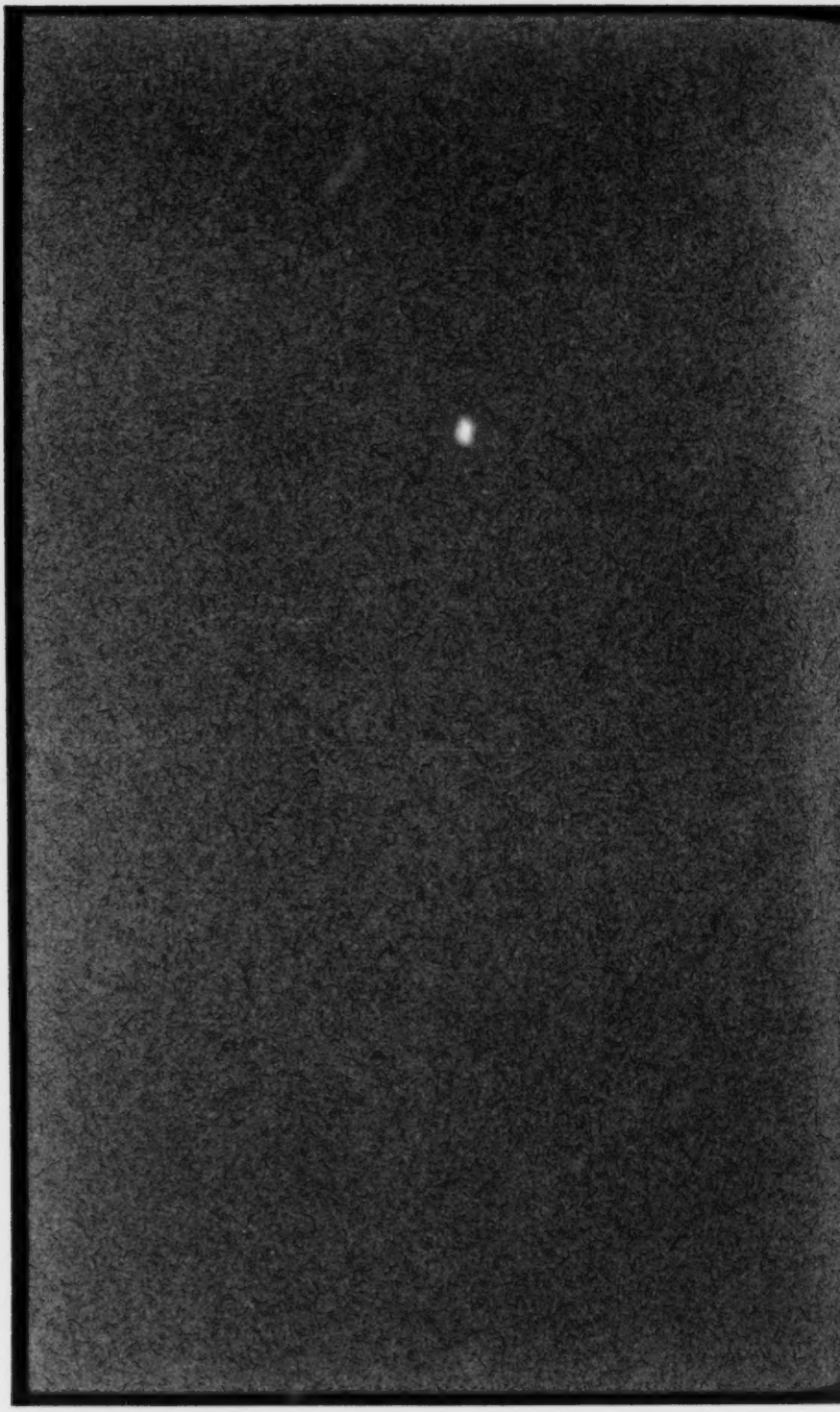
UNITED MOTOR SERVICE, INCORPORATED, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION



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OPINION BELOW

The opinion of the court below (R. 29–35) is reported in 35 F. Supp. 466.

JURISDICTION

The judgment of the Court of Claims was entered November 12, 1940 (R. 35). The petition for a writ of certiorari was filed February 1, 1941 (R. 35). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether the capital stock tax provisions of the National Industrial Recovery Act and of the Revenue Act of 1934 are unconstitutional.

STATUTES INVOLVED

The applicable statutory provisions are set forth in the Appendix (*infra*, pp. 6–10).

STATEMENT

The court below decided this case upon the petition and demurrer thereto (R. 29). From the petition the following facts appear:

Petitioner is a corporation engaged in the sale of automotive parts and accessories, and in the servicing of automotive vehicles (R. 1). Since the year 1918, General Motors Corporation has at all times owned all of the issued and outstanding capital stock of the petitioner (R. 2–3). For the years in which the filing of consolidated income tax returns for affiliated corporations was permitted, including the year 1933, General Motors Corporation filed consolidated income tax returns for itself and its subsidiaries, including petitioner (R. 6).

Prior to the time of the filing of the capital stock tax return for the year ended June 30, 1933, the persons charged with the responsibility of determining the values to be declared for capital stock tax purposes for General Motors Corporation and its various subsidiaries gave consideration to this question. It was finally decided that

the total of the values declared for General Motors Corporation and its subsidiaries should be substantially equal to such an amount as on a consolidated income and excess profits tax return for the year 1933 would not subject General Motors Corporation to any excess profits tax on net earnings up to 12½% on the capital and surplus as of December 31, 1932. The amount so determined was then allocated to the various subsidiaries on the basis of their relative estimated earnings for the year 1933. A similar method was adopted for the year ended June 30, 1934. The amount allocated to petitioner was $3,120,000 for the year ended June 30, 1933, and $6,000,000 for the year ended June 30, 1934 (R. 6–7).

For the year ended June 30, 1933, General Motors Corporation did not incur any excess profits tax liability on its consolidated income and excess profits tax return. For the year 1934, some of the subsidiary corporations paid excess profits taxes but the petitioner did not incur any excess profits tax liability (R. 9–11).

Petitioner filed capital stock tax returns for the years ended June 30, 1933 and 1934, showing the values above set forth, and paid the taxes assessed thereon (R. 5). Petitioner filed timely claims for refund of the taxes so paid, asserting that the statutory provisions imposing the capital stock tax were unconstitutional because, among other reasons, the tax was retrospective and the declaration of value for one year was binding for

other years (R. 16, 17–21). These refund claims were rejected by the Commissioner (R. 16) and the present action was thereupon begun. The Government's demurrer to the petition was sustained by the Court of Claims (R. 35).

ARGUMENT

This Court has denied three similar petitions for writs of certiorari. *Allied Agents* v. *United States,* 26 F. Supp. 98 (C. Cls.), certiorari denied, 308 U. S. 561; *Tennessee Consolidated Coal Co.* v. *United States,* 89 C. Cls. 542, certiorari denied, 310 U. S. 649; *cf. Chicago Telephone Supply Co.* v. *United States,* 23 F. Supp. 471 (C. Cls.), certiorari denied, 305 U. S. 628. The Government's brief opposing the petition for a writ of certiorari in the *Tennessee Consolidated Coal Co.* case listed a number of District Court decisions which had upheld the constitutionality of the capital stock tax. Since that time, the tax has also been sustained by the Circuit Court of Appeals for the Second Circuit in *Rochester Gas & Electric Corp.* v. *McGowan,* 115 F. (2d) 953 (C. C. A. 2d).

There is only one reason urged for granting the writ in this case which was not also urged in the other cases. The National Industrial Recovery Act levies a tax for the entire year upon corporations which are doing business during any part of the period from June 16, 1933, the effective date of the Act, to June 30, 1933; corporations ceasing to do business prior to June 16, 1933, are not taxed.

Petitioner contends that this provision makes the tax retroactive in effect and that it is so unreasonable, arbitrary and discriminatory as to render the statute invalid.[1] The contention is wholly without merit. The capital stock tax is imposed upon the act of doing business for any part of a year; since petitioner exercised the privilege of doing business after the enactment of the statute, there is nothing retroactive in its application. And since the tax is an excise based upon the value of the capital stock, there is no merit in petitioner's position that it should not be applied to a corporation which was not in existence for the entire year. See *United States* v. *Bennett*, 232 U. S. 299, 307; cf. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Billings* v. *United States*, 232 U. S. 261, 282.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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MARCH 1941.

[1] The same contention is made with respect to the Revenue Act of 1934 which levies a tax if the corporation was doing business for any part of the time between May 10, 1934, the effective date of the Act, and June 30, 1934.

APPENDIX

National Industrial Recovery Act, c. 90, 48 Stat. 195:

> SEC. 215. (a) For each year ending June 30 there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.
>
> * * * * *
>
> (c) The taxes imposed by this section shall not apply—
>
> (1) to any corporation enumerated in section 103 of the Revenue Act of 1932;
>
> (2) to any insurance company subject to the tax imposed by section 201 or 204 of such Act;
>
> (3) to any domestic corporation in respect of the year ending June 30, 1933, if it did not carry on or do business during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive; or
>
> (4) to any foreign corporation in respect of the year ending June 30, 1933, if it did not carry on or do business in the United States during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive.
>
> * * * * *
>
> (f) For the first year ending June 30 in respect of which a tax is imposed by this

section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases (for the period specified in the preceding sentence) in the capital employed in the transaction of its business in the United States.

* * * * *

SEC. 216. (a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or in the case of a foreign corporation the adjusted declared value of capital employed in the transaction of its business in the United States) as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

* * * * *

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 701. CAPITAL STOCK TAX.

(a) For each year ending June 30, beginning with the year ending June 30, 1934, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

* * * * *

(c) The taxes imposed by this section shall not apply—

(1) to any corporation enumerated in section 101;

(2) to any insurance company subject to the tax imposed by section 201, 204, or 207;

(3) to any domestic corporation in respect of the year ending June 30, 1934, if it

did not carry on or do business during a part of the period from the date of the enactment of this Act to June 30, 1934, both dates inclusive; or

(4) to any foreign corporation in respect of the year ending June 30, 1934, if it did not carry on or do business in the United States during a part of the period from the date of the enactment of this Act to June 30, 1934, both dates inclusive.

* * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid in surplus and contributions to capital, (3) its net income, (4) the excess of its income wholly exempt from the taxes imposed by Title I over the amount disallowed as a deduction by section 24 (a) (5) of such title, and (5) the amount of the dividend deduction allowable for income tax purposes, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earn-

ings or profits, and (C) the excess of the deductions allowable for income tax purposes over its gross income; adjustment being made for each income-tax taxable year included in the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. The amount of such adjustment for each such year shall be computed (on the basis of a separate return) according to the income tax law applicable to such year. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted (for the same income-tax taxable years as in the case of a domestic corporation), in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases in the capital employed in the transaction of its business in the United States.
(U. S. C., Title 26, Sec. 1358.)

U. S. GOVERNMENT PRINTING OFFICE: 1941